

**Green, LindaE**

---

**From:** Brian Kahn <brian.kahn@gizmodomedia.com>  
**Sent:** Tuesday, October 24, 2017 11:33 AM  
**To:** FOIA HQ  
**Subject:** URGENT FOIA request  
**Attachments:** 10\_24\_17 — EPA Scientists FOIA Request.pdf

Please see the attached Freedom of Information Act request.

Please be aware that under 5 U.S.C. § 552(a)(6)(A), a FOIA request is considered constructively denied after 20 business days and is subject to an appeal on that basis.

Best,  
Brian

---

Senior Reporter, Earther  
Gizmodo Media Group  
@blkahn

# GIZMODO

October 24, 2017

## VIA ELECTRONIC MAIL

Records, FOIA, and Privacy Branch  
Office of Environmental Information  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460  
[hq.foia@epa.gov](mailto:hq.foia@epa.gov)

### **Re: Expedited Freedom of Information Act Request**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. and the implementing regulations of the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, we—Brian Kahn and Maddie Stone, reporters of Gizmodo Media Group—make the following request for records.

On Oct. 22, the New York Times published a report that three EPA scientists' appearance at the State of the Narragansett Bay and Watershed meeting in Providence, Rhode Island, including an Oct. 23 press conference, had been canceled. At least one appearance was canceled by the EPA Office of Public Affairs according to the original story. The report was subsequently confirmed by other national and local outlets.

We seek to shed light on the EPA's decision for preventing the scientists for speaking at the meeting and press conference, including who specifically made the decision and why.

### **Requested Records**

We request that EPA produce the following within twenty business days and further seek expedited review of this request for the reasons identified below.

1. Communications related to the State of the Narragansett Bay and Watershed meeting including, but not limited to emails and instant messages between EPA Office of Public Affairs staff with Autumn Oczkowski, Rose Martin and Emily Shumchenia, the two scientists and one consultant scheduled to present at the program.
2. Communications related to the State of the Narragansett Bay and Watershed meeting including, but not limited to emails and instant messages between EPA Office of Public Affairs staff with Wayne Munns, director of the Atlantic ecology division of the EPA's Environmental Effects Research Laboratory.
3. Communications related to the Narragansett Bay Estuary Program including, but not limited to, emails and instant messages between EPA Office of Public Affairs staff and Caitlyn Whittle, coordinator for the program in EPA's Region 1 office.



Please provide all responsive records from Oct. 4, 2017, through the date of the search. The search for responsive records should include all individuals and locations where records are likely to exist.

In addition to the records requested above, we request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If the EPA uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

We seek all responsive records **regardless of format, medium, or physical characteristics**. In conducting your search, please understand the term "communications" in its broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

You may not exclude searches of files or emails in the personal custody of your officials, **such as personal email accounts**. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.<sup>1</sup> It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; we have a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.<sup>2</sup> If any potentially responsive records have been destroyed and/or transferred to other agencies or offices, such as the National Archives and Records Agency (NARA), then I request copies of the destruction or transfer slips as well as any other documentation relating to, mentioning or describing said transfer or destruction, to include but not be limited to confirmation that the EPA has no other copies of said records.

In addition, please note that in conducting a "reasonable search" as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered the EPA's prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.<sup>3</sup> Furthermore, agencies that have adopted the NARA Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but the EPA's archiving tools would capture that email under Capstone.

---

<sup>1</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016)

<sup>2</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) ("The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official's] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official's] work email account." (citations omitted))

<sup>3</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, "Managing Government Records Directive," M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>



Accordingly, we insist that the EPA **use the most up-to-date technologies to search for responsive information** and take steps to ensure that the most complete repositories of information are searched.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information "only if . . . disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."<sup>4</sup> If it is your position that any portion of the requested records is exempt from disclosure, we request that you **provide an index of those documents** as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As you are aware, a Vaughn index must describe each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."<sup>5</sup> Moreover, the Vaughn index "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information."<sup>6</sup> Further, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"<sup>7</sup>

In the event some portions of the requested records are properly exempt from disclosure, **please disclose any reasonably segregable nonexempt portions of the requested records**. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.<sup>8</sup> Claims of non-segregability must be made with the same degree of detail as required for claims of exemptions in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should **institute a preservation hold** on information responsive to this request. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, the EPA is on notice that **litigation is reasonably foreseeable**.

#### **Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 40 C.F.R. § 2.104(e), we request that the EPA expedite the processing of this request. **We certify to be true and correct to the best of our knowledge and belief**, that there is an urgent need to inform the public about the federal government activity that is the subject of this request.

Expedited processing is to be granted under the federal statute "in cases in which the person requesting the records demonstrates a compelling need" or "in other cases determined by the agency." As defined by statute, "compelling need" means that (a) "failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual"; or (b) "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity."

Our request satisfies the second condition and we ask that our request for expedited processing be approved.

---

<sup>4</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185)

<sup>5</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979)

<sup>6</sup> *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original)

<sup>7</sup> *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977))

<sup>8</sup> *Mead Data Central*, 566 F.2d at 261



Gizmodo, which employs both requesters as investigative reporters, is an organization “primarily engaged in disseminating information.”<sup>9</sup> (finding that Gizmodo is a “representative of the news media” because it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into distinct work, and distributes that work to an audience.”) And this request involves responsive records *urgently needed* to “inform the public concerning actual or alleged Federal Government activity.” The information we seek concerns “a matter of a current exigency to the American public.”<sup>10</sup>

In 2013, the D.C. Circuit court noted that “courts have found a ‘compelling need’ to exist when the subject matter of the request was central to a pressing issue of the day.”<sup>11</sup> The Court noted that “[i]n cases where compelling need was found, plaintiff’s cited numerous articles and reporters, including many in mainstream news sources such as the *New York Times*, the *Washington Post*, the *Los Angeles Times*, and/or the *San Francisco Chronicle*.”<sup>12</sup>

The courts found that the issue of news coverage is especially critical to courts in determining whether a “compelling need” exists for expedited FOIA processing, asserting, for example, that the “ultimate conclusion” with regards to expedited processing relies on important underlying facts, such as “the credibility of a claimant’s allegations regarding government activity, the existence of a threat to physical safety, or whether an issue is the subject of news coverage.”<sup>13</sup>

The EPA provided no clear explanation for why the talks were canceled to organizers, participants or the media, a decision which interferes with the ability of government scientists to present their work to the broader science community and the public. That in turn hinders collaboration among scientists and deprives the public of information about an estuary that’s home to 2 million people and an important economic driver due to commercial shellfishing, fishing and tourism activities.

We submit that the responsive records are central to ongoing news coverage at a wide variety of local and national media outlets, thus constituting a matter of a current exigency to the American public. Below is a sample of this recent coverage:

1. The New York Times: E.P.A. Cancels Talk on Climate Change by Agency Scientists  
<https://www.nytimes.com/2017/10/22/climate/epa-scientists.html>
2. The Washington Post: ‘Let us do our job’: Anger erupts over EPA’s apparent muzzling of scientists  
<https://www.washingtonpost.com/news/energy-environment/wp/2017/10/23/let-us-do-our-job-anger-erupts-over-epas-muzzling-of-scientists/>
3. The Providence Journal: EPA cancels talks by 3 agency scientists at Rhode Island event  
<http://www.providencejournal.com/zz/news/20171023/epa-cancels-talks-by-3-agency-scientists-at-rhode-island-event>

---

<sup>9</sup> *Am. Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004)

<sup>10</sup> *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (“Al-Fayed”) (quoting H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3469).

<sup>11</sup> *Wadelton v. Department of State*, 13-0412 ESH, 2013 WL 1760853 (D.D.C. Apr. 25, 2013)

<sup>12</sup> *Id.*

<sup>13</sup> *Al-Fayed* at 308.

4. CNN: EPA pulls scientists out of climate change conference talk  
<http://www.cnn.com/2017/10/23/politics/epa-rhode-island/index.html>
5. USA Today: Furor erupts over EPA decision to pull climate scientists from panel discussion  
<https://www.usatoday.com/story/news/politics/2017/10/23/furor-erupts-over-epa-decision-pull-climate-scientists-panel-discussion/789962001/>

#### **Fee Waiver**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), we request a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.

Moreover, Gizmodo is an online news organization and therefore we are entitled to a fee waiver on the grounds that disclosure of the information sought is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Regardless, we are willing to pay fees for this request up to \$50 without prior approval. If you estimate that the fees will exceed this limit, please notify me first.

#### **Further Correspondence**

Where possible, please provide responsive material in electronic format by email ([brian.kahn@gizmodomedia.com](mailto:brian.kahn@gizmodomedia.com)) or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to: Gizmodo Media Group (% Brian Kahn), 2 West 17th Street, 2nd Floor, New York, NY 10011.

Finally, **we request rolling production of these records** as they are located and reviewed.

We look forward to working with the EPA on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Brian Kahn at [brian.kahn@gizmodomedia.com](mailto:brian.kahn@gizmodomedia.com). Also, if our request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Please be aware that under 5 U.S.C. § 552(a)(6)(A), a FOIA request is considered constructively denied after 20 business days and is subject to an appeal on that basis.

Thank you for your prompt attention to this request.

Sincerely,

Brian Kahn  
Maddie Stone